FILE COPY

JUL 30

No. 245

In the Supreme Court of the United States

OCTOBER TERM, 1941

CUDAHY PACKING COMPANY OF LOUISIANA, LTD., PETITIONER

v.

PHILIP B. FLEMING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	2
Argument	7
Conclusion	11
Appendix	13

CITATIONS

Cases:	
Baltimore & Ohio R. R. Co. v. *Interstate Commerce Commission*, 221 U. S. 612	10, 11
Boyd v. *United States*, 116 U. S. 616	10
Federal Trade Comm. v. *American Tobacco Co.*, 264 U. S. 298	10, 11
Fleming, Administrator v. *Montgomery Ward & Co.*, 114 F. (2d) 384, certiorari denied 311 U. S. 690	9, 10
Hale v. *Henkel*, 201 U. S. 43	10, 11
Interstate Commerce Comm. v. *Brimson*, 154 U. S. 447	11
Lowell Sun Co. v. *Fleming*, C. C. A. 1st, decided June 6, 1941	7, 8
Wilson v. *United States*, 221 U. S. 361	10, 11
Constitution and Statutes:	
Fair Labor Standards Act of 1938 (Act of June 25, 1938, 52 Stat. 1060; U. S. C. Supp. V, Title 29, Sec. 201 *et seq.*):	
Sec. 4	13
Sec. 9	10, 13
Sec. 11	14
Federal Trade Commission Act (Act of September 26, 1914, 38 Stat. 717):	
Sec. 9 (U. S. C., Title 15, Sec. 49)	9, 15
Sec. 10 (U. S. C., Title 15, Sec. 50)	17

403736—41——1

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 245

CUDAHY PACKING COMPANY OF LOUISIANA, LTD.,
PETITIONER

v.

PHILIP B. FLEMING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 69–70) is reported in 119 F. (2d) 209. The District Court wrote no opinion.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 19, 1941 (R. 70). The petition for writ of certiorari was filed on July 8, 1941. Petitioner invokes the jurisdiction of this court

under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the Administrator of the Wage and Hour Division has authority to delegate his power to issue subpoenas *duces tecum*.

2. Whether the Administrator may lawfully institute in his own name legal proceedings to enforce administrative subpoenas.

3. Whether the subpoena here involved violates the Fourth Amendment of the Constitution.

STATUTES INVOLVED

The statutory provisions involved are Sections 4 (b), 4 (c), 9, 11 (a), and 11 (c) of the Fair Labor Standards Act of 1938 (52 Stat. 1060, U. S. C. Supp. V, Title 29, Sec. 201 *et seq.*) and Sections 9 and 10 of the Federal Trade Commission Act (38 Stat. 717, 722–724, U. S. C., Title 15, Secs. 49, 50). These sections of the Fair Labor Standards Act and of the Federal Trade Commission Act are set forth in the Appendix.

STATEMENT

On May 22, 1940, the Administrator, pursuant to Section 9 of the Fair Labor Standards Act, instituted this proceeding in the district court to require petitioner to produce before the Administrator, or his authorized representatives, certain records described in an administrative subpoena

duces tecum previously directed to petitioner (R. 2–10). The documents requested by the subpoena were petitioner's records showing the wages paid to and hours worked by its employees in its Shreveport, Louisiana, plant, and certain shipping records, for the period from October 24, 1938, to March 23, 1940 (R. 47). The subpoena was issued under the authority of the Administrator (R. 46) and was executed by Robert T. Amis, Regional Director of the Wage and Hour Division (R. 48, 5).

The application for enforcement of the subpoena (R. 2–9) alleged that petitioner, a Louisiana corporation, is a branch of the Cudahy Packing Company of Chicago, Illinois, which has numerous branches throughout the country (R. 3); that in its establishment at Shreveport, Louisiana, petitioner is engaged in the general business of receiving, manufacturing, handling, and distributing meat products and other packing house products (R. 4); that a major portion of the goods received by petitioner is shipped from sources without the State of Louisiana and that petitioner ships and delivers the goods manufactured, and handled by it to retail stores in Louisiana, Texas, and Arkansas; and that petitioner is engaged in interstate commerce and in the production of goods for interstate commerce (*ibid.*).

The application alleged further that a designated representative of the Administrator sought to make an inspection of petitioner's Shreveport establishment as provided by Section 11 (a) of the Act, but

that petitioner refused to make such records available (R. 4). The company was willing to allow the representative to inspect its records only if advised of "the names of the complaining parties and the alleged violations on the part of this company" (R. 51). The application alleged that the Administrator, on March 14, 1940, issued an order for investigation, a copy of which was attached to the application, reciting that there were reasonable grounds to believe that petitioner had violated certain provisions of the Act and directing that an investigation be made to determine whether such violations had occurred (R. 44, 5); that under the authority conferred upon him by such order for investigation, Regional Director Amis issued the subpoena duces tecum in question and the subpoena was duly served upon petitioner (R. 5); and that upon the return date of the subpoena petitioner failed and refused to appear and produce the books and records described therein (R. 6).

The application also alleged (1) that the payroll records were relevant and necessary to determine the amount of earnings of petitioner's employees and the extent of wage violations, if any; (2) that the time records were relevant and necessary to determine the hours worked by petitioner's employees, whether the employees' rates of pay satisfied the requirements of the Act, and whether petitioner's records were maintained in accordance with the Act, and (3) that the shipping records were relevant and necessary to determine the ex-

tent, if any, to which petitioner was engaged in interstate commerce (R. 7–8).

On May 22, 1940, the date of the filing of the Administrator's application, the District Court issued an order requiring petitioner to show cause why it should not be directed to appear before the Administrator or his representative, and produce the records and documents demanded by the subpoena (R. 52–53).

On June 14, 1940, petitioner filed a "motion to dismiss" the application (R. 54). This motion attacked the jurisdiction of the court on the ground that petitioner "is not engaged in the production of goods for commerce or in the transportation of goods in commerce, and that it is not engaged in any of the classes of businesses governed by the Fair Labor Standards Act" (R. 54). Petitioner's motion, in the alternative, asked that the subpoena be quashed on the grounds (a) that there had been no charges made that petitioner was guilty of violations of the Act, and (b) that the subpoena was unreasonable, burdensome, and not sufficiently definite. Finally, the motion prayed for a bill of particulars in the event the application should not be dismissed and the subpoena should not be quashed (R. 54–55).

The hearing on the application and order to show cause was held on June 18, 1940. At the outset of the hearing, the Administrator requested leave to file an affidavit (R. 57) setting out in greater detail

the facts alleged in the application. Counsel for petitioner objected to the filing of this affidavit (R. 59). The Court sustained petitioner's objection and disallowed the filing of the affidavit (R. 62).

The order of the District Court was entered on June 18, 1940 (R. 62–63). In its order, the Court held that jurisdiction was established by the application and the motion to dismiss, and that "no charge or showing of violations of the act are required as a prerequisite to the issuance of this order" (R. 62). The order directed petitioner to produce its records relating to wages paid to and hours worked by petitioner's employees during the period from October 24, 1938, to March 23, 1940. The demands of the subpoena for certain shipping records were "presently denied, leaving open the question, however, for subsequent presentation to the Court, in due course of the investigation, of a further request for the production of such other books, records, documents or evidence" (R. 62–63).

Petitioner appealed from the portions of the District Court's order requiring the production of its wage-and-hour records (R. 63–64). The Circuit Court of Appeals affirmed the District Court's order (R. 69–70), stating that "there is no doubt the administrator had authority to issue the subpoena and the Court had jurisdiction to enforce it" (R. 70). In its brief and argument before the Circuit Court of Appeals petitioner, in addition to

the contentions made in the District Court, urged that the Administrator had no authority to "delegate his power to issue subpoenas," and further that only the Attorney General of the United States has authority to institute subpoena enforcement proceedings of this character. The Circuit Court of Appeals rejected these contentions without comment (R. 70). A petition for rehearing (R. 71–77) was denied (R. 79), but the enforcement of the order of the court below was stayed pending disposition of the case by this Court (R. 80).

ARGUMENT

I

We believe the court below properly held that the Fair Labor Standards Act gave to the Administrator authority to delegate his power to issue subpoenas.[1] However, the decision is in conflict with *Lowell Sun Co.* v. *Fleming*, decided by the Circuit Court of Appeals for the First Circuit on June 6, 1941 (set forth in full in Pet. Br. pp. 16–23). The Government will shortly file a petition for writ of certiorari in the *Lowell Sun* case, and the ques-

[1] The petitioner did not raise this objection to the enforcement of the subpoena in the District Court. However, the question was briefed and argued in the Circuit Court of Appeals only on the merits of the contention, and the court's comment, "No error appearing from the record" (R. 70), is not apt if the decision were placed upon the failure to raise the question below.

tion of the Administrator's authority to delegate his power to issue subpoenas will frequently recur. We therefore do not oppose granting the writ in the present case. We respectfully submit, however, that the writ should be limited to this single issue, since the other questions presented by petitioner do not call for review by this Court.

II

Petitioner urges (Pet. 11–13) that the Administrator may not institute an action to compel obedience to his subpoena because Section 4 (b) of the Fair Labor Standards Act provides that attorneys appointed by the Administrator "may appear for and represent the Administrator in any litigation, but all such litigation shall be subject to the direction and control of the Attorney General." But, as the Circuit Court of Appeals for the First Circuit pointed out in the *Lowell Sun* case (Pet. 18):

> It seems to us clear that the provisions * * * are not mandatory but permissive; that they do not require that the Attorney General must exercise his power of direction and control in every litigated case but only that he may exercise those powers in any particular case if he deems that course advisable.

The Attorney General has in fact exercised the authority conferred upon him by Section 4 (b) and has expressly authorized the legal staff of the Administrator to conduct civil litigation under the Act

in the lower federal courts.[2] This arrangement is clearly a matter of internal administration between the Government officials involved. The litigation conducted by and in the name of the Administrator has been voluminous and no court has held any of these suits defective because not instituted by the Attorney General.[3] Section 9 of the Federal Trade Commission Act, which is incorporated in the Fair Labor Standards Act by Section 9 thereof, does require that the Attorney General institute mandamus actions (see Pet. 12) but plainly authorizes the Commission itself to seek enforcement of its subpoenas (see p. 15, *infra*).

III

Petitioner urges (Pet. 13–14) that the subpoena violates the Fourth Amendment. Identical argu-

[2] Under an arrangement between the Attorney General and the Administrator for the conduct of civil litigation under the Act, set forth in a letter dated January 18, 1939, from the Attorney General to the Administrator of the Wage and Hour Division, the Attorney General reserved to himself the right to take such part in the conduct of cases in the circuit courts of appeal and the state courts of last resort as he deems to be in the interest of the United States. He also reserved to himself the control and direction of litigation carried to the Supreme Court.

[3] It should be noted that the proceeding to enforce the subpoena upheld by the Circuit Court of Appeals for the Seventh Circuit in *Fleming, Administrator* v. *Montgomery Ward & Co., Inc.*, 114 F. (2d) 384 (C. C. A. 7th), certiorari denied, 311 U. S. 690, was likewise instituted in the name of the Administrator and was handled by attorneys appointed by the Administrator.

ments were advanced in the petition for writ of certiorari for review of *Fleming, Administrator* v. *Montgomery Ward & Co., Inc.*, 114 F. (2d) 384 (C. C. A. 7th). This Court denied certiorari on October 28, 1940. *Montgomery Ward & Co., Inc.* v. *Fleming*, 311 U. S. 690.

Federal Trade Commission v. *American Tobacco Co.*, 264 U. S. 298, relied upon by petitioner (Pet. 14) is not applicable to subpoenas issued under the Fair Labor Standards Act.[4] It arose under a clause of the Federal Trade Commission Act which is not incorporated in and does not apply to the Fair Labor Standards Act.[5] But, even if it be

---

[4] Petitioner's reference to *Boyd* v. *United States*, 116 U. S. 616 (Pet. 14), is misplaced. That case dealt solely with the right of a natural person to protection against self-incrimination, which does not extend to a corporation. *Hale* v. *Henkel*, 201 U. S. 43, 69–70, 74–75; *Wilson* v. *United States*, 221 U. S. 361, 383–384; *Balt. & Ohio R. R.* v. *Int. Com. Comm.*, 221 U. S. 612, 622. See also *Fleming* v. *Montgomery Ward & Co.*, *supra*.

[5] Section 9 of the Federal Trade Commission Act gives the Commission "access to, * * * and the right to copy any documentary evidence of any corporation being investigated or proceeded against". The issue in the *American Tobacco* case was whether the language quoted gave the Commission "unlimited right of access" to corporate papers, as it claimed (264 U. S. at 305). The Fair Labor Standards Act incorporates only those provisions of Section 9 of the Trade Commission Act "relating to the attendance of witnesses and the production of books, papers, and documents", not that giving administrative officials sweeping access to the papers of corporations. It was unnecessary to incorporate the latter power, inasmuch as its equivalent, narrowly confined to material pertinent under the Fair Labor

assumed that the same statutory provisions were applicable, the *American Tobacco* case is irrelevant here. The vice in the subpoena at issue in the *American Tobacco* case was that it was not limited to documents which would be material or relevant, but extended to substantially all of the respondent's papers. The subpoena as enforced here is restricted to papers which will show the wages paid and the hours worked, facts which obviously are highly relevant in any inquiry under the Fair Labor Standards Act.

The Fourth Amendment requires only that a demand for the production of documents be reasonably specific and limited to documents which might be relevant to the inquiry. See *Wilson* v. *United States*, 221 U. S. 361, 372, 375–376; *Baltimore & Ohio R. R. Co.* v. *Interstate Commerce Commission*, 221 U. S. 612, 622; *Hale* v. *Henkel*, 201 U. S. 43, 76–77; *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 476, 479. The provisions of the subpoena here involved are well within those requirements.

CONCLUSION

This petition presents no occasion for a writ of certiorari except with respect to the single question of the Administrator's authority to delegate his power to issue subpoenas. Accordingly, it is re-

---

Standards Act, is found in Section 11 (a) of the latter Act, which expressly authorizes the Administrator to inspect records necessary to determine whether any person has violated the Act.

spectfully submitted that, if a writ of certiorari is granted, it should be limited to the first of the issues presented by the petition.

Respectfully submitted.

CHARLES FAHY,
Acting Solicitor General.
WARNER W. GARDNER,
Special Assistant to the Attorney General.
GERARD D. REILLY,
Solicitor.
IRVING S. LEVY,
Assistant Solicitor.
BESSIE MARGOLIN,
Attorney,
Wage and Hour Division,
Department of Labor.

JULY 1941.

APPENDIX

STATUTORY PROVISIONS INVOLVED

Fair Labor Standards Act of 1938 (52 Stat. 1060; U. S. C., Supp. V, Title 29, Sec. 201 *et seq.*):

> SEC. 4 (b) * * * The Administrator may, subject to the civil-service laws, appoint such employees as he deems necessary to carry out his functions and duties under this Act and shall fix their compensation in accordance with the Classification Act of 1923, as amended. The Administrator may establish and utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may appear for and represent the Administrator in any litigation, but all such litigation shall be subject to the direction and control of the Attorney General. In the appointment, selection, classification, and promotion of officers and employees of the Administrator, no political test or qualification shall be permitted or given consideration, but all such appointments and promotions shall be given and made on the basis of merit and efficiency.
>
> (c) The principal office of the Administrator shall be in the District of Columbia, but he or his duly authorized representative may exercise any or all of his powers in any place.
>
> * * * * *
>
> SEC. 9. For the purpose of any hearing or investigation provided for in this Act, the provisions of sections 9 and 10 (relating to

the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 16, 1914, as amended (U. S. C., 1934 edition, title 15, secs. 49 and 50), are hereby made applicable to the jurisdiction, powers, and duties of the Administrator, the Chief of the Children's Bureau, and the industry committees.

* * * * * *

SEC. 11. (a) The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act. Except as provided in section 12 and in subsection (b) of this section, the Administrator shall utilize the bureaus and divisions of the Department of Labor for all the investigations and inspections necessary under this section. Except as provided in section 12, the Administrator shall bring all actions under section 17 to restrain violations of this Act.

* * * * * *

(c) Every employer subject to any provision of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall

make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder.

Federal Trade Commission Act (38 Stat. 717, 722–724; U. S. C. Title 15, secs. 49 and 50):

SEC. 9. For the purposes of this Act the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the commission may sign subpoenas, and members and examiners of the commission may administer oaths and affirmations, examine witnesses, and receive evidence.

Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or

to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

Upon the application of the Attorney General of the United States, at the request of the commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of this Act or any order of the commission made in pursuance thereof.

The commission may order testimony to be taken by deposition in any proceeding or investigation pending under this Act at any stage of such proceeding or investigation. Such depositions may be taken before any person designated by the commission and having power to administer oaths. Such testimony shall be reduced to writing by the person taking the depostion, or under his direction, and shall then be subscribed by the deponent. Any person may be compelled to appear and depose and to produce documentary evidence in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the commission as hereinbefore provided.

Witnesses summoned before the commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

No person shall be excused from attending and testifying or from producing docu-

mentary evidence before the commission or in obedience to the subpoena of the commission on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture. But no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise, before the commission in obedience to a subpoena issued by it: *Provided,* That no natural person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

SEC. 10. That any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry or to produce documentary evidence, if in his power to do so, in obedience to the subpoena or lawful requirement of the commission, shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not less than $1,000 nor more than $5,000, or by imprisonment for not more than one year, or by both such fine and imprisonment.

Any person who shall willfully make, or cause to be made, any false entry or statement of fact in any report required to be made under this Act, or who shall willfully make, or cause to be made, any false entry in any account, record, or memorandum kept by any corporation subject to this Act, or who shall willfully neglect or fail to make, or to cause to be made, full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions apper-

taining to the business of such corporation, or who shall willfully remove out of the jurisdiction of the United States, or willfully mutilate, alter, or by any other means falsify any documentary evidence of such corporation, or who shall willfully refuse to submit to the commission or to any of its authorized agents, for the purpose of inspection and taking copies, any documentary evidence of such corporation in his possession or within his control, shall be deemed guilty of an offense against the United States, and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than $1,000 nor more than $5,000, or to imprisonment for a term of not more than three years, or to both such fine and imprisonment.

If any corporation required by this Act to file any annual or special report shall fail so to do within the time fixed by the commission for filing the same, and such failure shall continue for thirty days after notice of such default, the corporation shall forfeit to the United States the sum of $100 for each and every day of the continuance of such failure, which forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the district where the corporation has its principal office or in any district in which it shall do business. It shall be the duty of the various district attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

Any officer or employee of the commission who shall make public any information obtained by the commission without its authority, unless directed by a court, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding $5,000, or by imprisonment not exceeding one year, or by fine and imprisonment, in the discretion of the court.

U. S. GOVERNMENT PRINTING OFFICE: 1941